No. 12135

United States
Court of Appeals
for the Ninth Circuit

BERT RUUD,

Appellant

vs.

AMERICAN PACKING & PROVISION CO., a Corporation,

Appellee

Brief for Appellant

Appeal from the United States District Court for the District of Idaho, Eastern Division

ALBAUGH, BLOEM, HILLMAN & BARNARD
Attorneys for Appellant
IDAHO FALLS, IDAHO

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Brief for Appellant

STATEMENT OF THE PLEADINGS AND JURISDICTION

Complaint

The complaint alleges that plaintiff is a citizen of Utah, being a corporation organized and existing therein. That defendant is a citizen of the State of Idaho. That the amount in controversy exceeds the sum of $3,000.

That plaintiff is engaged in the meat packing business at Ogden, Utah, and that defendant is engaged in ranching, engaged in raising livestock for commercial purposes.

That on or about November 4, 1946, the parties entered into a contract for the sale, by defendant to respondent, of 300 steers, for delivery about ten months later.

That delivery was demanded on or about September 3, 1947, and that defendant failed, neglected and refused to deliver any steers to plaintiff, and plaintiff was thereby damaged in the sum of $31,026.00, demand for which has been made and refused.

Amended Answer

The Amended Answer admits the citizenship and business of the parties, alleges that the contract was conditionally delivered and the conditions never met, that the original contract never became operative and was abandoned, and a new agreement made, that defendant offered to return the $3,000 payment made on the substitute contract, but that such offer was refused, and that defendant offered to deliver steers as required by the contract, which offer was also refused.

Jurisdiction

This is a suit of a civil nature between citizens of different states, where the amount in controversy exceeds $3,000, exclusive of interest and costs, and the United States District Court has jurisdiction under Title 28, Section 41 U. S. C. A. (Judicial Code, section 24, amended.)

The appeal is from a final judgment of the United States District Court for the Eastern District of Idaho. The United States Court of Appeals for the Ninth Circuit has appellate jurisdiction under Title 28, U. S. C. A. (Judicial Code, section 128, amended).

STATEMENT OF THE CASE

This is an action for damages for breach of an alleged written contract.

Appellant is a cattle rancher, owning and operating a ranch near Irwin, Idaho, where he feeds and pastures cattle during the summer and fall months. (Rec., pp. 19, 20, 34, 140, 141). Respondent is a corporation engaged in a general meat packing business at Ogden, Utah. (Rec., p. 2.) One, Louis Salerno is its chief cattle buyer. (Rec., pp. 125, 126.)

Shortly prior to November 1, 1946, Salerno entered into negotiations with appellant for a contract under which appellant would deliver 300 head of steers to respondent about ten or twelve months later. (Rec., pp. 125-128, 21.) The negotiations resulted in a contract being drawn by respondent as instructed by Salerno and forwarded to appellant by mail. (Rec., pp. 127, 142.)

The contract recited that appellant had 300 head of steers on the ranch at Irwin, branded "O" on left hip, which he was to care for until delivery was demanded the following fall, title to pass at the time of delivery. (Rec., pp. 4-8).

Appellant did not have 300 steers, or any other number, on his ranch or any place else, which fact was fully known to Salerno (Rec., pp. 35, 127.) It was necessarily contemplated that appellant would have to acquire the steers on the market or from other ranchers. (Rec., p. 128.) Appellant's ranch was located in a heavy snow country and he and Salerno understood that the cattle would not actually be

placed on the ranch until the following spring, when pasture would be available. (Rec., pp. 127, 128.) In the meantime, they would have to be fed and cared for at some other place where feed was available. (Rec., p. 128.)

It appears in the record that appellant had in mind that he would procure the steers from various sources, that he expected to acquire most of them from Peterson Brothers, in the Big Hole Country, near Jackson, Montana, but that he was free to get them wherever he could. (Rec., pp. 146, 96, 111-114.)

The contract recited that respondent made a down payment of $3,000 at the time of the execution of the contract, but this was not paid at that time, and the only payment which was made some weeks later recited that it was for 240 or more head of steers. (Ex. 16.)

Appellant signed the contract on or about November 3, 1946, and returned it to Salerno, but accompanied it with a letter, Exhibit 2, in which he stated that a provision in the contract for an allowance for shrinkage was not in accord with the previous oral negotiations, and he wanted this provision eliminated. (Ex. 2.)

Salerno and appellant then entered into further negotiations, by mail and also orally, and it appears in a letter written by Salerno under date of November 15th, Exhibit 15, that neither party then regarded the deal as closed, as Salerno stated in this letter that the shrinkage provision would have to remain and he asked if appellant wanted to go through with

the deal. The negotiations continued for several weeks, until about December 9th, when Salerno left a draft for $3,000 at an Idaho Falls hotel for appellant to pick up. This draft was the only payment of any kind made by respondent, and as stated, it recited that it was down payment for 240 or more head. (Rec., pp. 148-151.)

The trial court found that the original contract had been merely modified and only to the extent of reducing the number of steers to be delivered. (Rec., p. 176.) It is appellant's claim that by undisputed testimony it was established that the original contract had been abandoned and the parties had arrived at an entirely different deal. (Rec., pp. 151-155, 102-103.) Appellant contends that the testimony establishes that in these negotiations subsequent to the signing of the original contract, Salerno was informed that appellant had not been able to get the steers he originally expected to get, and that it was agreed that he would accept the check and thereafter get as many steers as he could, which he expected would be 240 or more. (Rec., pp. 103, 151-155.) Appellant offered to prove that it was agreed there would be no deal unless he was able to get steers. (Rec. p. 162.) The court denied this offer of proof, and its ruling and also its finding that the original contract was merely modified are assigned as errors.

It is appellant's theory that both the original contract and the subsequent agreement in December were made on the express condition that unless and until appellant was able to get suitable steers, the

contract would not be in effect. (Rec., pp. 162-163.) The trial court refused to permit appellant to show these conditions precedent, and its rulings in this respect are assigned as error.

Appellant did not acquire any steers for the contract, his explanation being that it was too late in the season by the time the parties finally reached an agreement. (Rec., pp 152, 102,103.)

The original contract called for 300 head of steers, nothing being specified as to age, kind, size, or quality. It was in form a contract by which appellant presently sold 300 steers to respondent, delivery to be made several months later, but title was not to pass until delivery was made. The price was fixed on a dressed weight basis, and varried according to how the grade or quality varied. For those that graded "A", the price, converted from the dressed weight price stated in the contract, was to be 17½ cents per pound live weight. For those that graded above "A", the price was higher, and for those grading below "A", the price was lower, according to the formula specified. The contract did not specify that any particular number or percentage were to be of any particular grade. (Ex. 1.) The trial court found that under the contract, appellant was required to furnish "good quality" steers, and its ruling in this respect is assigned as error.

The contract provided that appellant's operations in connection with the feeding, caring for, and dehorning the steers, would be at all times subject to the respondent's inspection and to its satisfaction,

but neither Salerno nor any other representative of respondent ever made any inspection or gave any directions, or even called at appellant's ranch, until August, 1947, when demand was made for delivery. (Ex. 1 Rec., p. 104.) When demand was made, it was for the full 300 head as called for in the original contract. (Rec., p. 158, Ex. 7.)

The evidence shows that appellant offered both by letter and orally to obtain 300 steers on the market and deliver them to respondent, and that this offer was refused by respondent. (Rec., p. 158.) Although this evidence was not contradicted, the trial court entirely disregarded the same, and found that no offer to perform had been made by appellant. (Rec., p. 177.) This ruling is assigned as error.

During the month of November, 1946, appellant had 218 head of cattle which he was winter feeding near Jackson, Wyoming. (Rec., pp. 144-145.) He put these cattle on his ranch in the summer of 1947, and sold them on the market at Idaho Falls, commencing in August of that year. (Ex. 3 and 4.) They varied widely as to age, weight and size, ranging from about 800 to 1300 pounds. (Ex. 3 and 4.) A large amount of testimony was received over the objections of appellant concerning these cattle, particularly as to their weight and quality, the objections being to the effect that there was no showing, or even any claim, that these cattle had anything to do with the contract, (Rec., pp. 35-83.) The rulings of the trial court permitting this evidence are assign-

ed as error.

The trial court also admitted testimony, over appellant's objections, as to the weight and quality of steers appellant expected to get from a Montana ranch for the contract. (Rec., pp. 22-24.) These were cattle he thought he could procure at the time he and Salerno were first negotiating. (Rec., pp. 110-115.) The adverse rulings of the trial court are assigned as error, particularly as to what the witness estimated the average weight of these cattle would be at the time of delivery under the contract, about ten months later. Appellant believes that any such estimates would be necessarily founded on mere speculation and conjecture.

On the question of damages, the evidence showed that the market price of slaughter steers, at Ogden, at the time delivery was demanded, ranged from sixteen cents to twenty-six cents for slaughter steers. (Rec., pp. 87-89.) The trial court, ruling that the contract required the delivery of "good quality" steers, found that the market price for that kind of steers was twenty-five cents. (Rec., p. 175.) It also found that the average weight of steers which should have been delivered was 950 pounds. (Rec., p. 175). These findings are assailed as erroneous.

Respondent did not call as a witness its agent who carried on the negotiations, Louis Salerno. In order to show what the parties did agree on after the original contract had been signed, appellant called him. (Rec. p. 125.) He was a hostile and unfriendly wit-

ness, and appellant sought to impeach his testimony by the use of his pre-trial deposition, but the court would not permit this to be done. (Rec., p. 129.) This ruling is assigned as error, under rule 26 (d) (1).

SPECIFICATION OF ERRORS

I

The Court erred in denying appellant's offer of proof, in which appellant offered to prove by the witness Bert Ruud, that at the time the contract was negotiated with plaintiff's agent, Louis Salerno, and immediately prior to the signing of the contract, the defendant did not have three hundred steers, or any other number whatever, on his ranch, and did not own any steers which were the subject matter of the contract; that it was understood and agreed between the plaintiff corporation, by and through said agent, Louis Salerno, that the contract did not take effect until defendant had purchased the steers which would be the subject matter of the contract, that the contract was delivered conditionally upon his obtaining such steers to be the subject matter of the contract; that the steers were never obtained and the subject matter of the contract was never in existence, and that the contract was never delivered and never became effective, for the reason that the court's ruling denying said offer of proof was contrary to law.

The offer of proof and the ruling thereon appear on pages 162-163 of the Record.

II

The Court erred in making Findings of Fact III, XV and XXI, all referring to the making and delivery of the contract in suit, to the effect that the contract was fully and unconditionally delivered, or, if conditionally delivered, the conditions were waived

by appellant, for the reason that there is not sufficient evidence to support the same, and the evidence is contrary thereto, in that the evidence establishes that the contract was delivered by appellant subject to the condition precedent that the conract was not to be in effect unless and until appellant obtained cattle to fill it, and to the further condition that certain provisions therein relating to an allowance of three per cent for shrinkage be eliminated, and the evidence discloses that these conditions were never met.

Further, said findings in legal effect are inconsistent with Finding IV, to the effect that the original contract was modified.

III

The Court erred in making its Finding of Fact V, for the reason that the written contract in suit, described in Finding III does not require the delivery of "good quality" steers, and there is no competent evidence to support any finding to that effect, and the effect of such finding is to vary and add to the terms of a written contract.

IV

The Court erred in overruling appellant's objections to testimony relative to quality of steers claimed to have been intended under the contract, for the reason that such testimony was incompetent, irrelevant and immaterial, and tended to vary and add to the terms of a written instrument.

The testimony, objections and rulings referred to

are found on pages 22, 23 and 24 of the Record, and the substance thereof is as follows:

Witness Ruud was asked on cross-examination as an adverse party what the quality of the steers covered by the contract was. Objected to that it was incompetent, irrelevant and immaterial, that the contract speaks for itself, and not proper cross-examination. Objection overruled.

After responding that he could not tell quality until cattle had been purchased, witness was asked concerning his testimony in his pre-trial deposition, which deposition was later admitted as Exhibit 10, over objection. He was asked concerning what quality of cattle he had testified he intended to get, and if he did not so testify that the original deal, as it was drawn up, would have been good cattle, had the deal been completed. Objected to that it was an attempt to vary the terms of a written contract. Objection overruled.

V

The Court erred in making Finding of Fact IX, for the reason that there is not sufficient competent evidence to support the same, said Finding in legal effect varies and adds to the terms of a written instrument, and for the further reason that all the evidence as to probable weight of cattle at the time delivery was demanded was based on mere speculation and conjecture.

VI

The Court erred in overruling appellant's objections to questions asked the witness Bert Ruud as

to what he estimated the steers he intended to get would have weighed at the time delivery was demanded, for the reason that such testimony was incompetent, irrelevant and immaterial, the contract did not call for cattle of any particular weight, such testimony was necessarily based on mere speculation and conjecture, and tended to vary and add to the terms of a written instrument.

The testimony, objections and rulings referred to are found on pages 24, 31, 32, 33 and 34 of the Record, and the substance thereof is as follows: Witness was asked what, under conditions existing at his ranch for pasturing and maintaining cattle during the season, cattle purchcased in November, 1946, then weighing 525 pounds, would have weighed in August or September, 1947. Objected to on the grounds that the same was incompetent, irrelevant and immaterial, and no foundation laid. No direct ruling appears in the record, but the witness was permitted to answer, and stated that that would depend on certain conditions. Witness was then asked concerning the amount of gain cattle would make during that part of such time they were on his ranch, and after stating that they would gain approximately 150 pounds on his ranch every year, he was again asked concerning his testimony in his pre-trial deposition concerning the weight of the so-called Peterson cattle, and if he did not then testify that if he had gotten the Peterson cattle they would have weighed nine hundred pounds at the time of delivery to plaintiff. Objected to as incompetent, irrelevant and immaterial, not

proper cross-examination, and also an attempt to vary the terms of a written instrument. Objection overruled.

VII

The Court erred in overruling appellant's objections to testimony concerning the weight and quality of certain cattle sold by appellant at Idaho Falls in the fall of 1947, and in the admission of Exhibits 5 and 6, the sales records concerning the same, for the reason that such testimony and exhibits were incompetent, irrevelant and immaterial, had no bearing on any of the issues of the case, and there is not sufficient evidence to show, or even tend to show, that such cattle were the cattle covered by the contract, and the evidence affirmatively shows that said cattle were not the cattle covered by the contract.

The testimony concerning cattle sold by appellant at Idaho Falls appears in a number of places in the Record.

Commencing on page 35 of the Record, witness J. J. Smith testified concerning cattle he had seen on appellant's ranch, which he later saw at the sales yard at Idaho Falls. He was then asked what the weight of these cattle was when he saw them in August, 1947. Objected to as incompetent, irrelevant and immaterial unless it be shown that plaintiff claimed these cattle were the subject matter of the contract. Objection overruled (Record, page 37). Further objection on similar grounds to continuation of this line of testimony overruled (Record, page 38).

Further objection made and overruled (Record, page 40).

Witness Orland Robertson was asked concerning his opinion as to what certain cattle he cared for in the fall of 1946 for thirty days would have weighed the following fall, being the same cattle sold in Idaho Falls in 1947. Objected to as incompetent, irrelevant and immaterial. Objection overruled (Record, page 49). The court required some further foundation as to the qualifications of the witness, and then allowed witness to answer over objection. (Record, page 51).

Exhibits 5 and 6, sales records of these cattle sold by appellant at Idaho Falls were identified and offered in evidence (Record, page 66). Objected to as follows: "We object to the introduction of exhibits 5 and 6. They have failed to connect them with this contract, or the cattle described as the subject matter in issue. It is an attempt to vary or modify the terms of the written contract by parol testimony without any pleading upon which to base such testimony or such a modification of the contract. These could be any cattle. It is incompetent, irrelevant and immaterial and cannot prove or tend to prove any issue in this case." Objection overruled. (Record, page 66).

VIII

The Court erred in making its findings of Fact IV, XIV, XVII and XVIII, to the effect that the original contract was modified only as to the number of steers to be delivered, for the reason that there is not sufficient evidence to support the same, and the

same are contrary to the evidence, in that the evidence establishes that the original contract described in Finding III was abandoned by the parties by the substitution of a new and different agreement, which was in no sense only a modification of the original contract. (Rec., pp. 152-155).

IX

The Court erred in refusing to permit appellant to impeach the witness Louis Salerno. Witness was the agent of respondent who carried on all negotiations with appellant, and he was a hostile and unfriendly witness. Appellant sought to impeach his testimony by the use of the pre-trial deposition of the witness, as permitted by Rule 26 (d) (1). The Court eroneously sustained respondent's objection. (Record, page 129).

X

The Court erred in making its findings of Fact XII, and XXII, both concerned with the market price of steers on the Ogden market at the time delivery was demanded, for the reason that there is not sufficient evidence to support the same, and the evidence shows that the market price for slaughter steers on the Ogden market at the time in question varied from sixteen to twenty-six cents per pound, and by reason thereof, respondent suffered no actual damages in any amount, and the Court thereby further erred in making Finding of Fact XXIII to the effect that respondent did suffer damages in the sum of $17,100.00, the same being contrary to the evidence, and based upon mere speculation and conjecture.

XI

The Court erred in making Findings of Fact VIII and XX, to the effect that appellant refused to perform the contract and did not offer to perform, for the reason that the same are not sustained by the evidence, and the uncontradicted evidence shows that appellant offered both orally and in writing to deliver steers to respondent to fill any obligation which might exist on his part. (Rec., p. 158).

XII

The Court erred in making its Findings of Fact VI, XIII and XVI, all to the effect that the plaintiff fully complied with the conditions, stipulations and agreements of said contract by paying the down payment required, and by reason thereof there was no failure of consideration, for the reason that said Findings are contrary to the evidence, in that the evidence establishes that the respondent never made the down payment called for by the terms of the original contract described in Finding III, and the payment subsequently made by respondent shows on its face and by other evidence that it was made on another and different subsequent agreement.

XIII

The Court erred in overruling appellant's motion to dismiss at the close of respondent's case, for the following reasons: The evidence did not show unconditional delivery of the contract, and affirmatively showed that the contract was never delivered; that there was never a meeting of the minds of the parties; there was no mutuality; the subject matter

of the contract was never sufficiently identified; it was impossible to ascertain from the contract or from any competent evidence the age of the cattle in question, the weight thereof, or the type; it was impossible to properly compute damages, and any damages that might be computed would necessarily be based on speculation and conjecture, and not on the contract or any competent evidence in the case; further, that the plaintiff failed to prove a cause of action or any damages in the case, and the evidence showed that plaintiff failed to perform the contract on its part.

The motion and ruling referred to appear on pages 123, 124 of the Record.

SUMMARY OF ARGUMENT

I

The evidence shows that appellant had no steers to fill the contract at the time the original contract was being negotiated. Appellant sought to show that it was understood and agreed the contract was not to be in effect until the steers were obtained with which to fill it. Such evidence went to the existence of the contract. It tended to show that it never became operative as a contract.

It was reversible error for the trial court to refuse to permit appellant to show such conditional delivery.

The contract contained recitals that the steers were on the ranch, branded in a certain manner. Respondent was responsible for these recitals being in the contract, but they were put there with full knowledge on the part of both parties that they were mere expressions of something which would be true only at some future date and not of present, existing facts. They were not binding on either party.

The evidence shows that appellant objected to certain of the terms of the original contract, and the parties entered into negotiations after it was signed, resulting in either a modification of the original contract, or the substitution of a new agreement. Although the contract recited it had been made, the down payment called for therein was not made until these subsequent negotiations had been finished, and it was not made on the original agreement but on

the substituted or modified agreement. The modified agreement was also subject to the condition that it was not to be in effect until steers were obtained for it, but the trial court did not permit this to be shown, which was error.

II

The original contract contained no requirements as to weight and grade of steers to be delivered. There is nothing in the language of the instrument or in the nature of repondent's business from which any inferences can be drawn that the parties intended steers of any particular weight and grade. There is no competent evidence to support the court's findings that the steers must grade "good quality," and that the average weight of the steers which should have been delivered was 950 pounds.

Assuming that the steers would have been of good quality, of any specified average weight, if and when they had been acquired, what they would weigh and grade at the time for delivery, ten to twelve months later, would depend on many variable factors. Respondent produced no competent evidence as to such factors, and the trial court's findings rest on mere speculation and conjecture.

The trial court permitted evidence relative to the weight and grade of some steers appellant was trying to get, but did not succeed in getting, for the original contract. It also permitted evidence as to the weight and grade of other steers which respondent had, but which were not shown or claimed to have

any connection with the contract. This evidence was permitted on the theory that the contract was ambiguous. It was not ambiguous, and the evidence was inadmissable, but even though it might have been properly admitted, it did not furnish any basis for the court's findings.

Appellant did not guarantee to deliver steers of any particular weight and grade, nor did the contract so require. The contract actually contemplated various grades. It was error for the trial court to hold that the contract required steers of good quality, of a specific average weight, and its findings in respect thereto are based on speculation and conjecture.

III

The trial court held that the original contract had been merely modified by reducing the number of steers to be delivered. The evidence shows that the original contract was abandoned, and a new agreement made. The court's finding is therefore erroneous, but in either event, whether the original contract was merely modified or wholly abandoned by the substitution of a new agreement, no action can be maintained on the original agreement. The agreement, as modified or substituted, must be pleaded and proved, and a demand or suit on the contract, as originally drawn, is improper.

IV

Louis Salerno, respondent's chief cattle buyer, conducted all negotiations for respondent. He was not called as a witness by respondent. He was, so far

as appellant is concerned, an adverse and hostile witness, but appellant called him to show the actual intentions of the parties with respect to the original contract and in the subsequent negotiations. When he became untruthful and evasive, appellant sought to impeach him through the use of his pre-trial deposition under Rule 26 (d) (1) of the Federal Rules of Practice. It was error for the trial court to deny appellant the right to use Salerno's pre-trial deposition for the purposes of impeachment.

V

All that could have been required under the contract was slaughter steers. The evidence shows that slaughter steers were available on the Ogden market at the time of delivery at prices ranging from 16 to 26 cents per pound for various grades. The contract provided for a price of 17½ cents, live weight, for Grade "A," with other grades to be paid for on basis of difference between buyer's market price for Grade "A" and the various grades actually delivered. Respondent offered no evidence as to difference, if any, for "A" grade and other grades. Accordingly, no damages were proved.

Appellants uncontradicted testimony shows that he offered to perform any obligations he was under to respondent by obtaining steers on the market and delivering them to respondent, but that his offer was declined. Exhibit 11 also shows that he offered to get other steers. The trial court had no right to reject this testimony and find that appellant made no offer to perform.

VI

No down payment was made by respondent at the time the contract was signed, and when a payment was made it was on the modified or substituted agreement. The trial court erred in finding that respondent fully complied with the contract on its part.

Failure to make the down payment at the time the contract was signed and making it on a different or modified agreement, in legal effect, prevented the original contract from ever becoming operative.

VII

The court erred in denying appellant's motion to dismiss at the close of respondent's case, for the reasons stated in the motion. (Rec., p. 123.)

VIII

The trial court adopted an erroneous view of the contract and the making thereof, and made erroneous rulings, with the result that only part of the essential facts were before the court on which to reach a decision in the case. By reason of such errors the trial court was misled into erroneously refusing to give proper credence to appellant's testimony. A new trial should be had under conditions that all the facts are disclosed.

ARGUMENT

I

Did the trial court err in denying appellant's offer of proof that the original contract was conditionally delivered, and that the same conditions attached to the subsequent new agreement or modification of the original contract?

This question is raised by Specifications of Error I and II, and as the legal principles involved apply to each specification, both will be considered together. Appellant here challenges the correctness of Findings of Fact III, XV and XXI.

The trial court found that the parties entered into a valid written contract, unconditionally delivered, on or about November 4, 1946, and that the only change thereafter made was to modify the contract by reducing the number of steers to be delivered from 300 to 240.

Appellant alleges in Paragraph III of his amended answer, in effect, that there was no legal delivery of the written contract for the reason that delivery thereof was subject to two conditions precedent: (1) That the provision therein contained for a three per cent shrinkage be eliminated; (2) That it was understood and agreed the contract was not to be in effect unless and until the defendant procured steers for the contract from other parties.

The record is fairly complete as to the first condition and as to how the parties acted in respect thereto. In his letter, Exhibit 2, which accompanied the contract when he returned it to respondent's agent, Louis Salerno, appellant demanded that the provi-

sion for shrinkage be eliminated. In response to this demand, Salerno stated in his letter of November 15, Exhibit 15, that the provision would have to remain. Salerno did not at that time regard the deal as closed and the contract in effect, as he specifically asked appellant if he wanted to go ahead with the deal. Thereafter they continued negotiating, and sometime in Dececmber they either modified the original contract or made a different agreement.

Appellant testified, in effect, that the condition or demand was never met so far as the original contract was concerned, that he did not waive the demand, and that when the parties negotiated a subsequent agreement, he was to receive payment at the rate of 17½ cents per pound, on a live weight basis, without any deduction for shrinkage. (Record, pages 154-155).

Inasmuch as no steers were delivered under either agreement, the matter of how payment was to be made is of no particular importance. It makes no particular difference whether or not this condition was ever met. What is important is that this condition precedent did exist, and it was at least one of the reasons why the parties found it necessary to engage in negotiations after the original contract was signed. It is closely allied with the other or second condition precedent which appellant contends existed, and its importance now lies in how it affects the trial court's finding that the result of the subsequent negotiations was only a modification of the original contract. We will discuss this phase of the case later

in this brief. We are presently concerned with whether or not evidence that such conditions both existed should have been admitted.

With respect to the second condition, the state of the evidence is very different. The trial court refused to permit appellant to show by parol that the contract was delivered with the understanding that it would not take effect until appellant could obtain steers for it. The trial court's rulings were made on the theory that the evidence would vary or alter the terms of the written instrument, as is shown by the following excerpts from the record.

Q. Did you own three hundred head of steers branded O on left hip?

Mr. Olmstead: We object to this as tending to vary the terms of a written contract.

The Court: This is obviously an attempt to vary the terms of this contract.

Mr. Albaugh: This is to show conditional delivery of the contract.

The Court: That again would vary the terms. Do you expect to show an impossibility of fulfillment of the contract?

Mr. Albaugh: No, but to show that it was delivered conditionally, to take effect upon the obtaining of the cattle.

The Court: I understood this conditional delivery to be predicated on the letter of November 3rd, having to do with the shrinkage.

Mr. Albaugh: Both, based on shrinkage and the conditional delivery to take effect when he could obtain the cattle.

The Court: It is difficult to imagine in this case an attempt to vary this by parol evidence.

Mr. Albaugh: The parol evidence is not varying the terms of the contract if the Court please. It is to show that it was to take effect upon the happening of certain conditions.

The Court: Let me call your attention to the provisions that the 300 head owned by and held on the seller's ranch were to be delivered - - -

Mr. Albaugh: - - That was erroneous.

The Court: You have not asked for a recision of the contract. The objection is sustained.

(Record, pages 141-142)

Appellant then and now contends that the evidence in question does not tend to vary or alter the terms of the written instrument, but is to show that the writing never became operative as a contract. The evidence which the court excluded goes to the existence of the contract, not to its terms.

Evidence is admissible for such purpose, under a well-known rule of law which is one of the recognized exceptions to the so-called "parol evidence rule."

The "parol evidence rule" which excludes evidence of a prior or contemporaneous oral agreement which would vary a written contract presupposes the existence of a valid written contract. 20 Am. Jur. 954. Bell vs. Mulkey, 7 S. W. (2d) 115.

Speaking generally, if the parol evidence attacks the existence of the contract, it does not fall within the condemnation of the "parol evidence rule." 20 Am. Jur. 954. Accordingly, such evidence is admissible where the existence of the contract is the subject of inquiry. This principle is the basis for the

admission of evidence in many cases, such as to show fraud or mistake which goes to the existence of the contract. Many other instances may bring into question the existence of the contract. Evidence which tends to negative such existence is admissible.

Non-delivery, or delivery which was only conditional, are matters going to the existence of the contract, and ordinarily may be shown by parol. The rule is stated in 20 Am. Jur. 955, as follows:

> "The rule that parol evidence is inadmissible to contradict or vary a written contract applies only to a written contract which is in force as a binding obligation. Parol evidence is always competent to show the non-existence of the contract or the conditions upon which the writing is to become effective as a contract. Evidence is admissible, at least in equity, to show that a writing which apparently constituted a contract was not intended or understood by either party to be binding as such. The oral testimony in such a case does not vary the terms of the writing, but shows that it was never intended to be a contract or to be of binding force between the parties. The rule that excludes parol evidence in contradiction of a written agreement has no application if the writing was not delivered as a present contract."

Examination of some of the cases cited as authorities for various parts of the foregoing show that the rule is well supported.

In McFarland v. Sikes, 54 Conn. 250, 7 A. 408, 1 Am. St. Rep. 111, the action was upon a promissory note.

Defendant claimed delivery was conditional. The court said:

> "A written contract must be in force as a binding obligation to make it subject to this rule. (Parol evidence rule). Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a valid obligation until the condition upon which its delivery depends has been fulfilled. If the payee of a note has it in his possession, that fact would be prima facie evidence that it had been delivered; but it would be only prima facie evidence. The fact could be shown to be otherwise, and by parol evidence.
>
> "Such parol evidence does not contradict the note or seek to vary its terms. It merely goes to the point of its non-delivery. The note, in its terms, is precisely what both the maker and the payee intended it to be. No one desires to vary its terms or to contradict them."

White Showers v. Fischer, 278 Mich. 22, 270 N. W. 205, involved a contract for purchase of an irrigation system. Defendant sought to show that the contract was delivered on condition that he would be allowed to cancel a similar contract given to another company, and that he could not effect the cancellation. In holding the evidence was admissible, the court gives a well-reasoned discussion of the rule, and cites many authorities. Among the cases cited, we believe the following are particularly in point, Cleveland Refining Co. v. Dunning, 115 Mich. 238, 73 N. W. 239, and Ware v. Allen, 128 U. S. 590, 9 S. Ct. 174, 32 L. Ed. 563.

In Bultman v. Frankhart, (Wis.) 215 N. W. 432, defendant signed a written contract for the purchase of a piano. The contract recited the making of a down payment, receipt of which was acknowledged by the seller. Actually no down payment was made. It was held that parol evidence was admissible to show that there was a contemporaneous oral agreement that the contract was not to be in effect until the down payment was actually made.

The law in Idaho on the subject is set forth in a well-reasoned opinion in Continental Jewelry Co. v. Ingelstrom, 43 Idaho, 337, 252 Pac. 186. The case involved a written contract for the sale of jewelry by plaintiff. Defendant was held entitled to show by parol that it was agreed with the salesman who took the order that the contract would not become effective until two conditions were met, viz: (1) That a threatened strike should be settled, and business restored to its normal condition, and (2) that the defendants should advise plaintiff the names of a number of prospective customers, and the plaintiff would then advertise the goods by mail to such persons and urge them to purchase such jewelry from defendants. The court cites a large number of cases supporting the rule.

Of the cases cited, we might mention Colonial Jewelry Co. v. Brown, (Okla.) 131 Pac. 1077, where it was held that the buyer who had signed a written contract for the purchase of jewelry could show a contemporaneous oral agreement with the salesman who took the order that the contract was not to be in

effect until five days after its execution, during which time defendants were at liberty to cancel the order, and that they so cancelled within the five days.

The rule permitting parol evidence to show a condition precedent applies to a number of different situations, and the cases on the various phases are innumerable.

It has found application in the type of cases where the condition was that the contract would not be in effect unless delivery could be made within a specified time. An example of this type, which has been cited many times, is S. H. Bowser Co. v. Fountain, 128, Minn. 198, 150 N. W. 795, L. R. A. 1916B 1036. The case involved a contract for the sale of a gasoline storage outfit. Defendant contended that there was a parol understanding that the contract was not to be in effect unless delivery was made within a specified time, and that the condition was never met. The court said:

> "Another rule equally well settled, however, is that, in case of a simple contract in writing, it is competent to show by parol that, notwithstanding the delivery of the writing, the parties intended and agreed that it should be operative as a contract only upon the happening of a future contingent event, or the performance of a condition. Westman v. Krumweide, 30 Minn. 313, 15 N. W. 255; Merchant's Exch. Bank v. Luckow, 37 Minn. 542, 35 N. W. 434; Smith v. Mussetter, 58 Minn. 159, 59 N. W. 995; Mendenhall v. Ulrich, 94 Minn. 100, 101 N. W. 1057; Samuel H. Chute Co. v. Latta, 123 Minn. 69, 142 N. W. 1048. The purpose and effect of such evidence are to

prove a condition precedent to the attachment of any obligation under the written instrument. This is not to vary the written instrument, but to prove that no contract was ever made, that its obligation never commenced."

It has been applied to cases involving the sale of real estate, where it has been held competent for the buyer to show by parol that it was understood that the contract would not take effect unless the seller could deliver possession within a specified time. Yeager v. Jackson, (Okla) 19 Pac. 2d 970. The court said:

"In Gamble v. Riley, 39 Okl. 363, 135 Pac. 390, the second syllabus is as follows: It is elementary that parol evidence is inadmissible to contradict or vary the terms of a valid written instrument. But the rule is almost equally well settled that parol evidence may be given to prove the existence of any separate parol agreement constituting a condition precedent to the attaching of any obligation under the written instrument; this is not to vary the terms of a written instrument, but to prove that no contract was ever made; that its obligation never commenced."

The rule has been applied to permit parol testimony that a lease would be ineffective unless the landlord made repairs. James v. Cortwright, 220 Ala. 578, 126 So. 631.

In Atlas Petroleum Co. v. Cocklin, 59 Fed. 2d 571, it was held that evidence of contemporaneous oral agreement was admissible to show that a written contract for the sale of distillate was not to be in effect until price had advanced.

In Washburn-Crosby Co. v. Riccobono, 162 La. 698, 111 So. 65, parol evidence was held admissible to show that outright sale contract in writing was conditional on approval of samples to be furnished.

A common application of the rule, so well known as to need no citation of authorities, is in that class of cases where one who signs a written contract is permitted to show that it was not to be in effect until signed by others, such as subscription contracts for the sale of corporate stock, and where donations or subscriptions to charitable or educational institutions are made on the understanding that they will not be effective until a certain total has been reached.

Appellant's contention that it was understood the contract was not to be in effect until the steers were obtained for the contract finds substantial support in the subsequent dealings of the parties. The very fact that they continued negotiating and eventually reduced the number of steers called for by the contract is quite persuasive that something kept the contract from being regarded as final by the parties. The fact that respondent did not make the down payment until the parties made such a reduction is persuasive. The only reason for making any reduction was because appellant had not procured the steers for the contract.

Appellant sought to show that the modified agreement was subject to the same condition that he would first have to get the steers for the contract before it became operative, but the trial court would not permit him to do so. (Record, page 153). Although the

trial court found that the original contract was merely modified and was not abandoned, in either event, appellant should have been permitted to show not only the existence of this condition precedent, but all the other terms and conditions of the subsequent agreement or modification as well. He was permitted to testify to some of these subsequent negotiations, but the trial court very apparently rejected his testimony, although it was not disputed.

Under the particular circumstances of this case, there is nothing inherently improbable about the parties making such a condition precedent to the contract becoming effective. Salerno knew that appellant did not have the steers, not only when the original contract was made, but also when they agreed to reduce the number to be delivered. (Rec. Pages 127, 152). In the very nature of things, the steers would have to be obtained before the contract could mean anything. Such a condition did not vary or alter the contract; it went to the existence of the contract, and as such, evidence thereto should have been admitted.

II

If appellant was required to deliver 240 *steers, what would have been their weight and grade?*

Specifications of Error III, IV, V, VI, and VII are all concerned with the above question, and are accordingly considered together. The correctness of Findings of Fact V and IX is challenged.

As we have stated, the trial court found that the parties entered into a valid, written contract, and

that the only change thereafter made was to modify it by reducing the number of steers to be delivered from 300 to 240. Appellant does not concede this to be correct, but for the purpose of discussing the trial court's findings as to weight and grade, we will disregard any question of conditional delivery of the contract, its validity otherwise, and as to what happened to it by way of modification or abandonment after it was signed.

The trial court found that appellant was required to deliver steers which graded "good quality," and that the average weight of the steers which should have been delivered would have been 950 pounds. Appellant challenges these findings for the reasons (1) there is nothing in the contract which requires delivery of steers of any particular weight or grade, (2) the legal effect of such findings is to vary and add to the terms of the written contract, and (3) there is no competent evidence to support such findings.

We necessarily and properly first look at and analyze the written instrument itself to determine just what, if anything, is expressly stated therein in respect to what weight and grade are required.

The contract recites that the Seller (appellant) "is the owner of certain steers now held upon the Seller's ranch near Irwin, Idaho, which said steers are branded O L Hip", that the Buyer (respondent) "desires to purchase three hundred (300) head of said steers," and the "Seller hereby agrees to sell and deliver to the Buyer, and the Buyer hereby

agrees to purchase from the Seller three hundred (300) head of the steers hereinbefore described". This language is the only description of any nature which appears in the instrument. There is absolutely nothing stated as to the breed, age, kind, weight, or grade.

At first thought, it would appear that no difficulty or question could ever arise over any such matters. The recitals that the steers were on the seller's ranch, branded in a certain manner, seem to be complete and positive identification. Under the ordinary rules applicable to such a situation, it would be understood that at the appropriate time, the seller would make a selection of the required number out of the larger herd on the ranch. The buyer would take them, as so selected, as they came, regardless of their age, size, weight, grade, or anything else, so long as they were the steers described in the contract. It would be presumed that the buyer knew what all the steers on the ranch were in these respects, and that he would be satisfied with whatever he received, so long as they came from the specified source.

The difficulty, however, arises in this case, for the reason that these recitals that the steers were on the ranch and branded were not statements of fact existing at the time the instrument was signed, and were not intended by the parties to be taken as such. There were no such steers on the ranch, and both parties knew it, and knew the steers would have to be acquired at some later date. (Record, P. 152-155).

We will show that these recitals stated things which both parties knew would not, and could not, take place until several months after the contract was signed.

There is, and can be, no doubt but that both parties knew there were no steers on the ranch. All negotiations were carried on by appellant and Louis Salerno, respondent's chief cattle buyer. Appellant testified that he did not have any cattle on the ranch at the time the contract was signed, except a few fat cattle then being marketed, and that Salerno knew this to be the case. (Record, page 35). Salerno himself also testified that he knew there were no cattle for the contract on the ranch and that appellant would have to buy them. (Record, page 127).

There are other indications in the evidence which show that the parties regarded these recitals as statements which would be the actual fact only at some future time. Appellant's ranch was located in a country of heavy winter snows, where winter feeding would not be practical. (Record, page 34). Salerno knew the cattle would not be wintered on the ranch, but would be wintered where feed would be available. (Record, page 128). He knew the character of appellant's ranch, and did not expect the steers would be placed on the ranch until pasture was available in the spring. (Record, page 129).

The contract was prepared by respondent's attorney, under directions given by Salerno. (Record, page 127). It was Salerno who was responsible for these recitals being in the contract, although he

knew the steers were not on the ranch, and that they would be placed there and branded as described in the contract only after several months.

There is still another illustration of the fact that Salerno caused statements to be put into the contract which were on their face recitals of existing facts, but actually of things which the parties understood would take place at some future time. This is the statement that "the Buyer herewith pays to the Seller, receipt of which by the Seller is hereby acknowledged, the sum of Three Thousand ($3,000.00) Dollars, as partial payment on the purchase price of said steers." The evidence shows that no such payment was actually made at the time appellant signed the contract. There was some disagreement over some of the terms of the contract, and no payment was even offered by respondent until these things had been ironed out. It was actually about six weeks later that a draft was delivered to appellant, (Ex. 16) and the draft shows on its face that at least one change had been made in the contract, being a reduction in the number of steers to be delivered under it.

It is not disputed, and cannot be disputed, but that both parties fully under stood the situation, and there is no claim that anyone was in any way misled by any of these recitals, nor is there any claim made by respondent of misrepresenation or fraud on the part of appellant when he signed the contract containing these recitals that the steers were on the ranch, branded as described.

More to the point on the issue we are here considering, however, there is nothing in these recitals as to the weight or grade of the steers at the time the contract was signed, and certainly nothing from which any inference can be drawn as to what the weight and grade would be at the time of delivery, some ten months later. Assuming, for the moment, that the steers had actually been on the ranch at the time the contract was signed, that they then graded "good quality", and that their average weight was some specific figure, say 500 pounds, how they would grade and what they would weigh nearly a year later would depend on many factors. Weather and quantity and quality of feed would play important parts. Cattlemen speak of a "good year" or a "poor year" for cattle. They also say that some of their cattle turn out to be "good feeders" but that others prove to be only fair or poor in that respect. Insects and noxious weeds have their effect on both weight and grade. In any herd of such size, there will normally be a considerable variation, both in weight and grade, even under the best conditions. Over this length of time, some would no doubt prove to be of excellent quality, some would grade good, but some would only grade fair, and so on down the line. Every herd has its choice "off the top" animals, but it also has its "tail enders." The parties took this into consideration in this case, as is apparent by their providing in the contract for a variation in the price to be paid according to how the steers graded.

Inasmuch as the parties knew and understood

there were no steers on the ranch, the recitals in the contract purporting to identify the contract steers by location and brand furnish no actual aid in determining what would be the weight or grade required under the terms of the contract. The contract being otherwise silent as to any such requirements, nothing can then be determined from the instrument itself in respect thereto. Accordingly, the court's findings as to weight and grade of steers to be delivered cannot rest upon any specific or expressed provisions, recitals, or language which can be found in the contract itself.

Is there any other basis for the court's findings in these respects?

Respondent argued to the trial court, and will no doubt urge here, that, because it was in the meat packing business, it can be inferred that the parties intended good quality slaughter steers. We do not believe this is a legitimate or reasonable inference. We will go along to the extent of saying that they did intend the steers for slaughter purposes, because the contract provides that payment should be made on a dressed weight basis, but that is as far as any inference can go from the mere fact that respondent is in the meat packing business. It is notorious that meat packing companies buy every kind, grade, and quality of animals that the market provides, and they slaughter them all. The only limitation they ever observe is that, if the meat is intended for human consumption, it must pass federal inspection. We do not know just how many different

grades there are on the market, but there certainly must be a considerable number, ranging all the way from the very choice down to the cutters, canners, and bologna bulls. They are all "slaughter" animals, and the packers buy every grade for slaughter purposes.

As we have stated, the contract itself indicates that the parties themselves knew there would necessarily be a difference in grades, and they provided accordingly by setting up a formula under which the price paid would vary according to how the steers actually graded when they were delivered. The contract does not specify any limits on how high or how low the steers might grade, nor are there any requirements that any particular number or percentage would have to be of any specific grade.

It follows, that the only inference that can be fairly drawn from the contract itself as to grade is that the parties contemplated various grades, as long as they were slaughter steers. The contract, then, could have been satisfied by delivery of slaughter steers of any grade. To find, as the trial court did, that the contract required all the steers to be of one particular grade or quality directly contradicts the express language of the contract. Such finding tends to vary and add to the terms of the written instrument.

On this subject of the inferences which can reasonably and properly be drawn in this case, certainly there is nothing in the language of the contract from which it can be inferred that the steers were to be of any specific average weight. Nothing at all

is stated. The contract simply leaves the matter wide open.

The trial court, in its memorandum decision, says that the contract, as construed by appellant himself, contemplated steers of good quality. This has absolutely no foundation in the evidence. Appellant said he would try to buy good steers for the contract. (Record, page 23). He also said the Peterson steers would have been good quality if he had been able to get them. (Record, page 113). Naturally it would be to appellant's benefit to get good steers whether they were for the contract or for any other purpose, but that is certainly different from construing this contract to mean that he had to deliver only steers that graded "good quality." He undoubtedly meant to get good steers if he could, but he did not guarantee anything of that kind.

It follows that the court's findings as to both weight and grade cannot be based upon, and are not supported by, any inferences that can be properly drawn from the writing itself.

Nothing being expressly stated, and there being no particular language from which any inferences can be drawn, as to either weight or grade, if there is any basis anywhere to support the court's findings, it would have to be found in the evidence, which we will now examine.

Over appellant's objections, the court admitted certain evidence more or less directed to the subject of weight and grade. Appellant contends that this evidence was erroneously admitted in the first place,

and further, even if admissible, it does not furnish any sufficient or reasonable basis for what the court found.

It is, of course, only where the language of a contract is ambiguous and uncertain, and susceptible of more than one construction, that a court, may, under well established rules, interfere to reach a proper construction, and make that certain which is itself uncertain. 12 Am. Jur. 752. Griffin v. Fairmont Coal Co. (W. Va.) 53 S. E. 24, 2 LRA (NS) 1115.

A further limitation on this right of the court to construe a contract is the rule, as stated in Tappen v. Idaho Irr. Co., 36 Idaho, 78, 210 Pac. 591, that the intention of the parties to a contract is to be deduced from the language employed by them, and the terms of the contract, where unambiguous, are conclusive, in the absence of averment and proof of mistake, the question not being of the intention existing in the minds of the parties, but what intention is expressed by the language used.

It should also be kept in mind that Idaho follows the universal rule that a written contract, in case of doubt or ambiguity, should be interpreted against the party who has drawn it. Hauter v. Coeur d'Alene Min. Co., 39 Ida. 621, 228 Pac. 259.

Whether or not parol or extrinsic evidence was admissible to show what weight and grade of steers was required by the contract depends entirely on whether or not there is any real uncertainty or ambiguity in the instrument in respect thereto. As the

contract was originally drawn, apparently no uncertainty or ambiguity could ever arise. As we have said, if the recitals as to location and brand had been true, no question of this kind would occur, because respondent would have had to take the steers on delivery as they came, and weight and grade would be of importance only in calculating the price to be paid. Because these recitals were not, and were not intended by the parties to be, representations of actual facts, we must, in effect, eliminate them from the contract in construing it. We would then have left a contract which provides merely for the sale of 300 unidentified steers, at a price to be determined according to how they graded and weighed on delivery. Is there now any uncertainty or ambiguity?

Such elimination leaves the subject-matter of the contract unidentified, and there does appear to be some uncertainty in that respect. Parol or extrinsic evidence would accordingly be admissible to identify the subject-matter, such as showing that some specific herd was intended, or that the parties had agreed on some particular kind, age, weight, and grade. But that is as far as such evidence could go, and it could properly be admitted only to so identify the subject matter. If so limited, it would not tend to vary the contract, but would only make certain the uncertainty as to subject matter.

So far as any expressions of what weight and grade would be required, the contract is just as complete and certain as it ever was, with these recitals eliminated. The elimination does not affect the con-

tract in any way in those particular respects. Even with these recitals in the contract there is no provision or stipulation or warranty that the steers were to be of any specific weight or grade, and the mere elimination of the recitals cannot possibly be so construed so as to add anything of that nature to the instrument.

The trial court's findings that appellant was required to deliver steers of specific weight and grade, in effect, imports something in the nature of warranties to that effect into the contract. Allowing evidence to be introduced that the steers should be of some specific weight and grade could only have been done on the theory that such warranties could be implied and imported into the contract.

It is a well recognized rule, however, that if a written contract purports to contain the whole agreement, and it is not apparent from the writing itself that something is omitted which it is clear the parties intended was to be supplied by extrinsic evidence, parol evidence is not admissible to supply any claimed omissions. Naumberg v. Young (N. J.) 43 Am. Rep. 380; Hei v. Heller (Wis.) 10 N. W. 620. The court must determine from the writing itself whether the same is a full expression of the agreement of the parties. Armstrong Paint Co. v. Cont. Can Co. (Ill.) 133 N. E. 711.

In case of sale of a chattel, where the parties have reduced to writing what appears to be a complete and valid contract of sale, it will, in the absence of fraud, accident or mistake, be conclusively presum-

ed that the writing contains the entire contract, and parol evidence of prior or contemporaneous representations or statements as to the quality of the chattel is inadmissible to add to, take from, or vary the written instrument. Bond v. Perrin, (Ga.) 88 S. E. 954. Hoffman v. Franklin Motor Car Co. (Ga.) 122 S. E. 896.

Where a contract for the sale of coal described it as screenings from a certain plant, it was held in Sterling-Midland Coal Co. v. Great Lakes Coal (Ill.) 165 N. E. 793, that parol evidence was inadmissible to show that seller had been informed of the purpose for which the coal was intended and had made an express warranty of quality.

The case of Geo. A. Moore & Co. v. Mathieu, 13 Fed. 2d 747, affirming a district court decision reported in 4 Fed. 2d, 251, is quite in point. Contract was for the sale of "native brown sugar" to be shipped from a specified locality. The court held that the contract would be satisfied by a tender of sugar meeting such description, and no warranty as to quality or grade could be implied.

In Interstate Grocery Co. v. George William Bentley Co., 214 Mass. 227, 101 N. E. 147, the court said:

> "Upon the sale of goods, by name or description, in the absence of some other controlling stipulation in the contract, a condition is implied that the goods shall be merchantable under that name. They must be goods known in the market and among those familiar with that kind of trade by that description, and of such quality as to

have value; this is not a warranty of quality. It does not require any particular grade."

Streff v. Gold Medal Creamery Co., (Cal.) 273 Pac. 831, involved a claim for damages on account of milk delivered not being of high quality. The written contract merely provided that, "Seller hereby agrees to sell all milk to purchaser" at a specified price. At the trial, the court permitted introduction of testimony as to an oral contemporaneous agreement to the effect that the seller was to furnish milk of a certain quality. Seller denied any such agreement. Inasmuch as the trial court found that there was no such oral agreement, the appellate court did not have to pass on the admissibility of the parol evidence, but it indicated the evidence should not have been admitted. The court said:

> "Furthermore, defendant admitted in open court that the milk was merchantable. There was nothing in the contract to show that any special grade or quality of milk was to be furnished. The requirement of merchantability, assuming there was an implied warranty as to merchantability under Section 1768 of the Civil Code (Uniform Sales Act) does not require that the goods be of first quality, or even that they shall be as good as the average of goods."

Kenney v. Grogan (Cal.) 120 Pac. 434, involved a case of a sale of a growing crop of olives, nearly matured. Before delivery, the olives were badly frosted, and to preserve them from total loss, the buyer received them and processed them into oil, as they could not stand reshipping to the seller. The oil recovered was of an inferior grade. The seller brought

an action for the contract price, and recovering only a part thereof, appealed. In reversing the lower court, the supreme court, applying the rule, said:

> "Referring to the term 'merchantable', Williston on Sales, Section 243, states the following: 'The requirement, when it exists, that goods shall be merchantable does not require that the goods shall be of first quality, or even that they shall be as good as the average of goods of the sort*** If there is no warranty of fitness for a particular purpose, the buyer cannot claim more than that the goods, with their defects known, shall be salable as goods of the general kind which they were described or supposed to be when bought.' Our conclusion is that, under the circumstances of this case, including the conditions surrounding the making of the contract between the parties to this action, there was no implied warranty imposed upon the plaintiff as to the quality which the olives should possess at the time of delivery; and that, further, even conceding that an implied warranty as to merchantable condition became a part of the contract, then the evidence is insufficient to sustain the finding of the trial court wherein it is determined that the fruit as furnished was unmerchantable."

In Rollins vs. Northern Land & Logging Co., (Wis.) 114 N. W. 819, plaintiff agreed to sell "spruce pulp wood", at an agreed price, on future delivery. Defendant claimed it was of inferior quality, and refused to pay the full price. The court held that there was no implied warranty that the wood was of any particular quality, and that so long as it was "spruce

pulp wood", plaintiff was entitled to the contract price.

We call attention to the recent case of Salzman v. Maldaver, (Mich.) 168 A. L. R. 381, 24 N. W. 2d, 161, which illustrates the rule. The court said:

> "In the second count of the declaration plaintiffs alleged the breach of an implied warranty of quality and fitness. They claim that this implied warranty arose by reason the fact that, prior to the execution of the written contract, they had informed defendants of the purpose for which the aluminum sheets were to be used, that is, to manufacture kitchen utensils and other articles in which aluminum would appear in its natural state. The written contract did not indicate for what purpose the aluminum was to be used ,and plaintiffs base their claim of an implied warranty only upon oral representations made prior to its execution. Here, again, the parol evidence rule, as a rule of law, bars plaintiffs from asserting an implied warranty which could be established only by parol evidence which would vary the terms of the written contract. The written contract was clear and unambiguous, and parol evidence could not be adduced to add to or change the contract so as to create either an express or an implied warranty."

There is an exhaustive and illuminating annotation on the subject in 70 A. L. R. 752, to which we invite the court's attention. In the interests of brevity, we will not attempt to review the same, but simply state that from that annotation and the cases we have cited, by way of summary, it may be said: (1) Where the written contract appears to be com-

plete on its face, in the absence of fraud, accident, or mistake, parol or extrinsic evidence is not admissible to prove that the parties contemplated a particular quality or kind, and no implied warranty to that effect can be added to or imported into the contract. (2) The only warranty as to quality or kind that can be implied is that the goods be of merchantable or salable quality, corresponding with the description stated in the contract, and there is no warranty that they shall be of any particular grade or quality.

We therefore contend that the trial court erred in admitting, over appellant's objections, any evidence as to the grade and weight of steers which it is claimed appellant should have delivered under the contract. In addition, we contend that the evidence which the court did receive in these respects, even if admissible, does not furnish any proper or reasonable basis for the court's findings as to such matters. We think this will be demonstrated by a consideration of the evidence on this point, which we will now discuss.

The matter first came up when appellant was called for cross-examination as an adverse party. (Record, page 22). Appellant was asked directly what was the quality of the steers covered by the contract. Appellant answered that he could not tell the quality until the steers had been purchased. He was then asked what his testimony was concerning certain steers which he had given in a pre-trial deposition. The court observed that the contract was, in a

measure, ambiguous.

The deposition referred to is in evidence as Exhibit 10. It appears therefrom that at the time the deal was being negotiated, appellant expected to obtain some steers from some cattle ranchers known as Peterson Brothers, located in the Big Hole country, near Jackson, Montana. He had been negotiating with them, and believed he could get enough steers from them to partially, if not completely, fill any contract he might make with respondent. He kept delaying—as he puts it, "stalling"—closing any deal with Peterson Brothers until he had closed the contract with respondent. Although the original contract had been signed, neither appellant nor respondent regarded the deal as closed, as evidenced by the fact that the parties continued negotiating for several weeks, and respondent delayed making the down payment of $3,000 for several weeks until a final agreement was reached. In the meantime, Peterson Brothers changed their minds, and decided not to sell. (R-111-115). Appellant then advised respondent's agent, Salerno, that he had lost out on getting the Peterson steers. In this deposition he did testify that the Peterson steers would have been good quality steers if he had gotten them, and that they weighed about 525 pounds average at that time. He was asked what they would have weighed in August or September of 1947, if he had maintained and cared for them on his ranch under the conditions which existed. All of this testimony was objected to, but the objections were overruled. (Record, pages 22-24,

31-35). He answered that it would depend on various things, and that usually they gained about 150 pounds during the period he could keep them on his ranch. Over further objection, he was then asked if he had not testified in his deposition that the Peterson cattle would have weighed about 900 pounds at the time of delivery. He stated that they probably would if they had a good year. He explained further that part of the gain would have been made on hay during the winter, and that the 150 pounds was the gain they would make during the summer period on grass at the ranch.

However, appellant was not required to obtain these Peterson steers, or any other particular steers, for the contract. He was at liberty to purchase steers wherever he could find them, in Montana, Idaho, or Wyoming. (Record, page 146). Assuming that the Peterson steers would have been of good quality or grade, and that they would have weighed an average of 525 pounds, if he had obtained them, does it follow that steers which he would or could obtain elsewhere would necessarily grade or weigh the same? That would be an absurd conclusion. We can assume it would be to appellant's best interests to try to get the best grade he could find, but was he under any obligation to obtain any particular grade? Was there any obligation to get steers of any certain weight? The contract does not say so. If he had gotten the Peterson steers for the contract, and later on it turned out that he was mistaken in his judgment, or if he had a poor feeding season, or

for any other reason they did not grade as good quality or reach some specific weight a year later, would that have been a breach of the contract?

At any rate, he did not get the Peterson steers, and respondent does not claim they were connected with the contract in any way. What their particular weight and quality was is certainly immaterial, and the testimony relative thereto does not prove any issue in this case.

Many pages of the record are taken up by evidence concerning certain steers which appellant sold in Idaho Falls in August and September of 1947. (Record, pages 35-83). The testimony shows that appellant was buying and selling cattle of all kinds all of the time. (Record, pages 21-22. The contract itself recites that he had other cattle.

When respondent began introducing evidence relative to these steers sold at Idaho Falls, appellant objected thereto on the ground that it would be immaterial unless it be made to appear that these steers were claimed by respondent to have some connection with the contract. The court overruled the objections, and the rulings are assigned as errors. (Record, page 37, 40).

It appears from the record that these particular steers were acquired by appellant from several different owners, some time in 1946, the exact time not appearing in the record. They were purchased by appellant from Wyoming owners, and were being fed that winter in the area known as Jackson Hole

in that state.

Although the trial court said in its memorandum decision that there could be no doubt but that defendant expected to use these Wyoming steers, pro tanto to fulfill the contract, we think the evidence shows conclusively that these Wyoming steers had no connection therewith. The trial court based its thought on the matter apparently on the belief that the steers then bore the O brand on the left hip. The evidence shows, however, that this was not in any sense a brand. It was only a mark left by the bottom of a bottle dipped in green paint. It was put there only to identify the steers while they were being moved, and would wash off in a short time. (Record, page 147). The evidence, however, was almost entirely to the effect that these steers had no connection with the contract. First and foremost, we have appellant's direct and uncontradicted testimony that they were not the contract cattle. (Record, page 145). He had these cattle when the witness Orland Robertson went to work for him feeding them, which was about November 9th, 1946. (Record, page 46). At that time, as we have pointed out, neither appellant nor respondent's agent, Salerno, regarded their deal as closed. They did not come to any final agreement, which the trial court found was merely a modification of the original contract, until about December 9th, when the $3,000 draft was turned over by Salerno. Appellant told Salerno just before the draft was delivered to him that he had not been able to get steers for the contract (Record, page 152). This testi-

mony stands uncontradicted and undisputed. At that time he had owned these Wyoming steers for at least a month, and there were only 218 steers in that bunch. If they had been intended as the cattle for the contract, there was no reason on earth why he would not have so told Salerno, and in the very nature of things, he certainly would have done so, and if he had, Salerno would have so testified. The fact that respondent did not make any attempt to have Salerno identify these Wyoming steers as the subjecct of contract, and did not call him as a witness for that purpose, is highly significant. The quite obvious conclusion is that he knew they were not the contract cattle.

We digress, for a moment, to point out that Idaho follows what is but the general rule that if a party fails to produce the testimony of an available witness on a material issue in the case, it may be inferred that his testimony, if presented, would be adverse to the party who fails to call him. Federal Land Bank of Spokane v. Union Central Life Ins. Co., 6 Pac. 2d 486, 51 Idaho 490; Bedke v. Bedke, 53 Pac. 2d 1175, 56 Idaho 235.

Appelant's testimony that the reason the parties did not go through with the deal according to the contract as originally written was because he had not been able to get steers for the contract also stands uncontradicted. (Record, page 153). Appelant claims the original deal was abandoned. The court found that it was only modified. In either event, the only reason for any change in the contract

would be because appellant had failed to get steers for it. There could have been no other reason for any change. Notwithstanding appellant had these Wyoming cattle while these negotiations were being carried on, it was still made plain to Salerno that appellant was thereafter still to acquire steers for the deal when they made the modification. (Record, page 153). We do not conceive of anything that would more clearly show that these Wyoming steers had nothing to do with the contract, but there are still other things which indicate the same thing.

Appellant's testimony in his pre-trial deposition about the Peterson steers was that they averaged about 525 pounds at the time he expected to acquire them. (Record, page 24). He testified at the trial that the contract provided for dehorning and that would indicate respondent wanted light weight or "short" yearlings. (Record, page 146). As appears from Exhibits 5 and 6, the Wyoming steers varied a great deal in weight, all the way from 845 to about 1300 pounds. They had been dehorned before appellant acquired them, and had been branded with several different brands. They were "long", not "short", yearlings. (Record, page 145). These things indicate that they were generally more mature than the young type steers which appellant and Salerno had in mind. Admittedly, a few of them might have been used to fill out the deal, and probably would have been acceptable to respondent, but the evidence as a whole, shows that, taken as a group, they were not

intended to be the steers for this contract.

Respondent made no attempt to identify the subject matter of the contract, or to tie the contract to any particular cattle. It made no claim that these Wyoming steers were the contract steers. Its agent, Salerno, testified that when he made demand on appellant for delivery, he was not claiming, and could not claim, these particular steers. (Record, page 131). As we have said, if these steers had any connection with the contract, Salerno certainly would have known it, and he undoubtedly would have so testified.

It follows that evidence as to the weight and grade of the Wyoming steers was not material to the issues of this case. Appellant's objections to evidence concerning the same should have been sustained.

There remains just one more item bearing on the issue of grade or quality. When appellant signed the contract, and sent it back to Salerno, it was accompanied by a letter, Exhibit 2. In this letter appellant indicated that he had acquired part of the steers for the contract, and that they were "the best bunch of steers I ever fed." It does not appear what particular steers he referred to in the letter. It appears most probable that he was referring to the Peterson steers, which he at that time thought he was going to get, because he says he would be at Jackson with the cattle, and Jackson, Montana, was the location of the Peterson ranches. (Record, pages 111-112). It was the time the fall run of steers was on the market, they were available and he was anxious to get

the down payment from respondent so that he could, in turn, close his deal with Peterson Brothers. Respondent did not make the down payment on the strength of this statement, however, nor was it misled in any way about appellant having the steers, because thereafter, and before any money was paid over by respondent, appellant told Salerno he had "fallen down" on getting the steers for the contract. (Record, page 152). This stands uncontradicted in the record.

The important point, however, is that there is nothing in this statement which binds appellant to deliver steers of any grade or weight. As we have already said, even if he had acquired good quality steers of any particular weight, what their weight and grade would be months later, when the time came for delivery, would depend on many factors. Competent evidence should have been submitted by respondent on this point, but no such evidence was offered.

Particularly with respect to the question of weight, there is another most vital objection to this evidence, so far as it supplies any basis for the court's finding of a 950 pound average. That figure was never mentioned with reference to the Peterson steers. Nor do the weights of the Wyoming steers, as shown in Exhibits 5 and 6, support any such figure.

With respect to the Peterson steers, it was stated that they would probably have weighed about 900 pounds, if they had a good year. (Record, page 34).

That this is highly speculative and rests upon conjecture is apparent, but in any event, it certainly does not support any finding of 950 pounds.

We might say, in passing, that the weight of any herd of steers over a ten or twelve months period would certainly be affected by many factors, even more than how they would grade at the end of that period. If we were to assume, for the purposes of argument, that the Peterson steers were intended to be the contract cattle, and that they weighed 525 pounds, on an average, in November, 1946, what they would weigh in August or September, 1947, would be anybody's guess, in the absence of any evidence as to surrounding circumstances, rainfall, pasture, etc., but it would be no more than a guess. The duty of proving how they would be affected by these many factors rested on the respondent, but it offered no evidence.

Exhibits 5 and 6 are the sales records of the steers which we have referred to as the "Wyoming" steers. These exhibits show the weights of some individual animals and the weights of several groups or bunches of animals, 218 head in all. Weights of individual animals varied enormously, from 845 to about 1300 pounds. This wide variation in itself demonstrates how absurd, if not impossible, it is to base any finding on the weights of these animals as to what would have been the average weight of the steers which should have been delivered under the contract. Moreover, even the average weight of these 218 head has

no relation to the figure selected by the trial court.

The 950 pound figure was plucked out of thin air, and there is absolutely no basis in the evidence for it.

We are well aware that in construing a contract, the court may make certain that which can be made certain, but there must be some evidentiary basis for what the court does find. So far as the evidence in this case is concerned, it would be just as reasonable for the court to find that the steers should weigh 845 pounds, or 900, or 1300, or any other figure. Any figure arbitrarily selected would have just as much support in the evidence. From the evidence submitted by respondent in this case, or perhaps we should say from the lack of evidence, any attempt to say what an average weight of 300 or 240 steers, as the case may be, which were unidentified, would be many months in the future, necessarily must rest on pure speculation and conjecture. And even if they had been propertly identified, to say what they would weigh months later is still highly speculative, unless there is competent evidence about the many factors which would influence their weight in the meantime.

If there was any actual ambiguity in the contract as to weight and grade, requiring extrinsic evidence to enable the court to reach a proper construction of the contract, there was certainly a direct and proper method by which any such ambiguity could have been explained. Louis Salerno carried on the negotiations, and he must have known the facts. To prove what it claims the parties intended by this contract,

respondent has elected to put in only some evidence about the weight and grade of some cattle which have not been shown to have any connection with this contract. We say this evidence proves absolutely nothing, so far as this case is concerned. If the parties had actually agreed on steers of any particular kind, weight or grade, why did not respondent at least attempt to show it by the obvious direct method of using Salerno's testimony?

It is elementary that an agreement, to be binding, must be definite and certain. It is evident that courts can neither specifically enforce agreements nor award damages for their breach when they are wanting in certainty. Damages cannot be measured for the breach of an obligation when the nature and extent of the obligation are unknown, being neither certain nor capable of being made certain. 12 Am. Jur. 554.

We think the case of Mason v. Ruffin (La..) 130 So. 843, is a particularly good illustration of wherein this contract is, under the evidence, totally lacking in that certainty which the law requires, and of the principles which should be applied to this case. Plaintiff sued for balance due on 34 head of steers sold to defendant. Defendant denied any balance due and counter-claimed for damages for breach of the contract for failure to deliver 66 additional steers, claiming the contract was for a minimum of 100 head, of three different classes with a different price for each class. The trial court found for the defendant on the cross-complaint, that the contract requir-

ed a minimum of 100 head, but that there was no specific number of each grade fixed, and that plaintiff could have complied with the contract by delivery of the whole number required of the smallest class, which the court found would have been of an average weight of 600 pounds, and assessed damages on that basis. The appellate court held that the trial court correctly rejected plaintiff's claim because of the breach, but reversed the other findings, saying:

> "However, if we took the position of the judge of the lower court that there was an agreement for the delivery of 100 head of steers, we would be unable to award damages for the reason that the amount of damages is too uncertain and indefinite to justify any award. It is shown that there were three classes of steers contemplated, and the alleged contract does not specify how many of either class were to be delivered, neither does it specify what the weights of each class should be. He claims damages based on a sale of 5 cents per pound and there is no way of arriving at an accurate weight of the cattle alleged to have been bought. The lower court stated that the smaller class, which if delivered, would have been a compliance with the contract, would average 600 pounds each. However, there is no evidence to justify such a finding. One witness places the weight of the two year olds, some at 500 pounds and some at 550. If plaintiff had delivered all sixty-six steers of the large classification, it is shown that their weights were from 1,000 pounds to as high as 1,472. If the defendant had sold the steers according to the same

classification that he had agreed to buy them, there would have been something accurate by which to measure his damages; but he claims to have bought the steers by classification, so much for each classification, regardless of weight, and to have sold them by weight only, namely 5 cents per pound all around. The only way that the court could arrive at the weight of the sixty-six steers without proof of their weight, although they were all of the same classification, would be purely and simply by guess, and we are not authorized to do that.

"All damages must be proved with legal certainty * * * * If damages could be allowed in this case for breach of contract, the court is without right to fix the damages for the reason that the proof is too uncertain and indefinite as to amount. There is no way to arrive at the weight of sixty-six head of steers to be delivered and no just or equitable way to estimate the weight."

The weight and grade of the steers goes directly, of course, to the calculation the court made in assessing damages, and we will discuss the effect of the admission of the evidence in question, and the court's findings thereon, under the subject of damages. We can summarize our position on the question of the admissibility of the evidence on the subject of weight and grade, what it proved or did not prove, and the court's findings thereon, as follows:

1. The contract required only that appellant deliver merchantable "slaughter" steers, and there was no requirement that the same be of any particular weight or grade.

2. The contract was not ambiguous, and it was er-

ror to admit parol or extrinsic evidence that steers of any particular weight or grade were required.

3. Evidence as to the weight and grade of the Peterson and the Wyoming steers was immaterial, and, in any event, did not prove anything as to the weight or grade of steers which should have been delivered under the contract.

4. There is no competent evidence to sustain the court's findings that appellant was required to deliver good quality steers weighing an average of 950 pounds.

III

Did the trial court err in holding that the parties merely modified the original contract, and what was the effect of any change or modification?

Specification of Error VIII is directed to this question, and the correctness of Findings of Fact IV, XIV, XVII, and XVIII, all of which go to the effect of the negotiations between the parties subsequent to the signing of the original contract, is challenged.

That the parties entered into certain negotiations after the original contract was signed can hardly be disputed. There are facts which prove this beyond question, being the letters in evidence as Exhibits 2 and 15, appellant's undisputed testimony that they did negotiate, and the fact that when the $3,000 draft was delivered to appellant, it showed on its face that it was for a down payment on 240 steers instead of 300. This $3,000.00 was in the form of a draft drawn on respondent, and not an ordinary bank check.

When respondent honored the draft, it had notice of what appeared thereon, and it thereby ratified the new contract or the modification of the original contract.

The evidence in respect to what was said in these conversations between Salerno and appellant is admittedly not as clear and direct as it could have been. Appellant's testimony at times was not entirely responsive, and tended to state conclusions instead of giving the conversations verbatim, but the essential facts appear quite clearly and fully therefrom. There was some discussion concerning appellant's demand that the three per cent shrink provision be eliminated. (Record, page 155). It definitely appears that appellant told Salerno he had not been able to get steers for the contract. The court did not, however, permit him to state why he did not thereafter procure cattle for the modified or new contract. (Record, page 153).

Some further details of these conversations and negotiations appear in appellant's pre-trial deposition, Exhibit 10, which was put in evidence by respondent. It appears therefrom that appellant complained because no money had been put up on the deal by respondent, and that Salerno suggested that he accept the down payment and try to buy some steers during the winter. (Record, pages 95-97).

It appears from the trial court's preliminary or memorandum decision that the court arbitrarily rejected all of this evidence, except what appeared on the draft, Exhibit 16, and thus completely eliminated

the effect of these subsequent negotiations except in the matter of reducing the number of steers to be delivered, although appellant's testimony was not contradicted in any way. (Record, page 165). Appellant contends that was this erroneous and prejudicial.

Considering this action of the trial court in arbitrarily rejecting all of appellant's testimony as to these subsequent negotiations, we think the general rule is as follows: "Uncontradicted evidence should ordinarily be taken as true, and cannot be wholly discredited or disregarded if not opposed to probabilities or arbitrarily rejected, even though the witnesses are parties or interested; and where the evidence tends to establish a fact which it is within the power and to the interest of the opposing party to disprove, if false, his failure to attempt to disprove it strengthens the probative force of the evidence tending to show it." 23 C. J. 47.

While this rule is not followed strictly by all courts, it has been recognized and declared to be the law in Idaho. In Pierstorff v. Grays Auto Shop, 58 Idaho 438, 74 Pac. (2d) 171, the supreme court of Idaho announced the rule in the following language:

> "The rule applicable to all witnesses, whether parties or interested in the event of an action, is that either a board, court, or jury, must accept as true the positive, uncontradicted testimony of a credible witness, unless his testimony is inherently improbable, or rendered so by facts and circumstances disclosed at the hearing or trial. (Manley v. Harvey Lumber Co., 175 Minn. 489, 221 N. W. 913, 914). In Jeffrey v. Trouse, 100

Mont. 538, 50 Pac. (2d) 872, 874, it is held that neither the trial court nor a jury may arbitrarily or capriciously disregard the testimony of a witness unimpeached by any of the modes known to the law, if such testimony does not exceed probability."

This rule was followed in First Trust & Savings Bank v. Randall, 59 Idaho, 705, 89 Pac. (2d) 741, in which the court cites the Pierstorff case with approval and states:

"The rule was recently announced by this court that the court must accept as true the positive, uncontradicted testimony of a credible witness, unless his testimony is inherently improbable, or rendered so by facts and circumstances disclosed at the hearing or the trial and that the trial court may not arbitrarily or capriciously disregard the testimony of a witness unimpeached by the any of the modes known to the law, if such testimony does not exceed probability."

The rule is followed by most federal courts. Alabama Title & Trust Co. v. Millsap, 71 Fed. (2d) 518; Weicker v. Bromfeld, 34 Fed. (2d) 377; Gibson v. Southern Pacific Co., 67 Fed. (2d) 758.

All of the elements of the rule appear in this case. The testimony of appellant was uncontradicted. There is nothing inherently improbable about it—in fact it appears most reasonable and probable in the light of the particular circumstances that Salerno knew the steers would have to be purchased and that they would not be placed on appellant's ranch until the following spring. Certainly respondent had

ample opportunity to contradict this evidence if it was not true, as its agent, Salerno, was present in the courtroom throughout the trial. He was the other party to the negotiations, and he knew what was said.

The effect of this evidence, had the trial court given it the credence to which appellant was properly entitled, goes far beyond a mere modification of the original contract. It shows what amounts to a complete abandonment thereof, and the substitution of an entirely new agreement.

It is elementary that it is competent for the parties to a written contract, by parol, to altogether waive, dissolve, or abandon it, or to add to, change, or modify it, or vary or qualify its terms, and thus make a new one. 12 Am. Jur. 1006.

It is also well settled that a contract need not be rescinded by an express agreement to that effect. The parties may impliedly rescind it by making a new contract inconsistent therewith. 12 Am. Jur. 1013.

There is substantial authority to the effect that modification of an executory contract has the legal effect of creating a new contract. Pleasant v. Arizona Storage & Dist. Co., 34 Ariz. 68, 267 Pac. 794; Hawkeye Clay Works v. Globe & Rutgers Fire Ins. Co., 202 Iowa 1270, 211 N. W. 860. 17 C. J. S. 868.

In any event, whether the original contract should be considered as merely modified, or whether it should be considered as entirely abandoned by the substitution of a new agreement, the trial court's

findings are inconsistent with the only evidence on the subject. The only evidence as to what took place during these subsequent negotiations was the testimony given by appellant. The only explanation as to why the down-payment draft was made to show it was for a different number of steers than the number called for by the contract was the explanation given by appellant. The trial court did say, in its memorandum decision, that it was resolving certain doubts touching on these negotiations against respondent, because of respondent's failure to interrogate Salerno. (Record, page 167). At the same time, the court says it does not believe appellant's testimony except where it is fully corroborated by other evidence. (Record, page 166).

Of course, the trial court could not wholly ignore the effect of the 240 figure on the draft, because it was there in black and white. The court says it will not believe appellant's explanation of why it was put there. Salerno, the man who put it there, offered no explanation. As a result, the court, in effect, made its own explanation—one which is inconsistent with neither appellant's explanation nor with the inferences which arise from the failure of respondent to offer any other explanation.

When all the evidence is considered, and the uncontradicted testimony of appellant is given the effect to which it is entitled by law, the only correct finding would be that the original contract was abandoned by substitution of a new one. Even under a finding that the contract was modified, respondent

could not maintain any action on the contract as it originally existed. It is well settled that no recovery can be had where the cause of action, pleaded in the petition, rests upon one contract and the evidence in support of plaintiff's case discloses another and a different contract.

The case of Ross-Saskatoon Lbr. Co. v. Turner, (Mo.) 253 S. W. 119, illustrates this principle. The court specifically states that where a contract has been modified, the party suing thereon must plead and stand upon the contract as made by the modification.

In Koons v. St. Louis Car Co., (Mo.) 101 S. W. 49, the court states that where an original contract is modified and varied by a subsequent oral agreement between the parties, the whole matter is thrown into parol, and in order to recover upon such modified contract, the contract as so modified must be distinctly pleaded.

In Adkins v. Pikeville Supplying and Planing Mill Co., (Ky.) 295 S. W. 440, it was held that where an original contract, though modified by subsequent contract is not entirely superseded by subsequent modification, it, together with modification, constitutes the basis of action for breach, and both must be pleaded.

There are many other cases which illustrate the rule, but it is so universally recognized that it seems unnecessary to pursue the matter further.

Respondent has at all times insisted on performance according to the original contract without re-

gard to any subsequent modification. Its demand for delivery was for the full 300 head, and was accordingly an improper demand. (Exhibit 7. Record, Pages 130, 139). Respondent's complaint is based solely on the original written contract without respect to any modification.

In this situation, when the evidence disclosed such a material change in the original contract, appellant was entitled to a dismissal or non-suit. At the very least, respondent should have amended its complaint to conform to the evidence, in which event all details of the modified or new agreement could have been fully shown. Respondent would have the burden of showing all the facts in order to prove its case.

As it is, there is substantial evidence in the record, which stands uncontradicted, that there were other changes in the original contract in addition to the reduction in number of steers. The trial court had no right to arbitrarily reject this evidence.

It was not incumbent on respondent to prove more than that the original contract was so changed or modified that no cause of action could be predicated on the contract as it originally was written. The trial court necessarily found there had been one substantial change, at least. Accordingly, the complaint being based on the contract as it originally stood, no recovery should have been allowed when the proof showed the cause of action declared on no longer existed.

IV

Did the trial court err in refusing to allow appellant to impeach the witness Louis Salerno?

The question arises from Specification of Error IX.

Louis Salerno was respondent's chief cattle buyer, and he conducted all negotiations with appellant, both before and after the original written contract was signed. The contract was prepared from his directions. (Record, pages 125, 126, 128).

We have heretofore discussed some of the circumstances which attended the execution of the original contract. We have showed that appellant did not have the cattle for the contract and that Salerno knew this to be the fact. Nevertheless, he directed the placing in the contract of the recitals that the steers were on the ranch, branded in a certain manner. We have also shown that he did not regard the deal as closed by the mere signing of the contract, as appears from his letter, Exhibit 15, and from his subsequently entering into negotiations with appellant which resulted in at least a modification of the contract.

Respondent made no direct attempt to identify any particular steers as the subject matter of the contract, nor did it offer any direct evidence as to just what kind of steers the parties had in mind. It merely offered the contract in evidence, and thereafter sought to give the trial court a basis for calculating damages by the evidence relative to the Peterson steers and the Wyoming steers, without, how

ever, making any direct attempt to show that such steers had any connection with the contract.

The question naturally arises, "Why did not the respondent call its chief cattle buyer, the man who handled all of negotiations on its behalf, and thereby identify the cattle covered by the contract and give pertinent evidence as to the weight and quality of the cattle?" If the contract was ambiguous, as the trial court ruled, why did not Salerno testify that the Wyoming cattle, or the Peterson cattle, or some other particular herd of cattle, were the subject matter of the contract, or at least testify that the parties had agreed on cattle of some particular weight and quality for the contract? Why did he not deny the testimony of appellant concerning their negotiations between the time the contract was signed and the payment of the $3000.00? Why did he not refute appellant's testimony as to appellant's offer to purchase cattle on the market to fill the contract? Why did respondent refuse to call this employee as a witness?

The conclusion is inescapable that respondent dare not call Salerno to the witness stand and submit him to cross-examination by appellant. Respondent was trying to prove indirectly that the Wyoming cattle might be the subject-matter of the contract, and respondent was trying to avoid or conceal any evidence of the modification or abandonment of the original contract. If Salerno had admitted on cross-examination that the Wyoming cattle were not covered by the contract, all of respondent's evidence concerning them and their sale at the Idaho Falls

Livestock Auction Company's sales yard would have been immaterial and stricken from the record.

It is reasonable and permissible under the law, to presume that Salerno's testimony would have been unfavorable to respondent's case. As a matter of fact, we believe Salerno could not have avoided admitting the Wyoming cattle were not the contract cattle. We believe he would have admitted the original contract was modified in other respects than merely reducing the number of steers to be delivered. We believe he would have had to admit that appellant did offer to fill any obligation he was under to respondent by obtaining steers on the market and delivering them.

With respondent resorting to such indirection and apparent concealment, appellant felt that the actual facts, not mere inferences, should be shown, and appellant put Salerno on the stand and tried to get at the truth. He was a hostile witness, however, and when he became evasive, appellant attempted to impeach him through his pre-trial deposition and compel him to divulge the facts. The trial court, however, erroneously "rung down the iron curtain", and the witness was protected by this ruling and by his employer. (Record, page 129).

Rule 26(d) (1) of the Federal Rules of Civil Procedure is clear and direct. The rule states:

> "Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness."

The trial court's ruling was directly contrary to

the rule. We have not found any cases where any question has arisen under this rule. Indeed, the language of the rule is so clear that it is difficult to see how the question could arise. In discussing the rule, Moore's Federal Practice, Vol. 2, page 2487, has this to say:

> "Rule 26(d) (1) permits a party to use any deposition, whether of a party or other person, for the purpose of 'contradicting or impeaching the testimony of the deponent as a witness' irrespective of whether the witness is the party's own witness or the witness of some other party. This slight relaxation of the rule against impeaching one's own witness is in accord with the best modern authorities on that subject."

Moore then points out that when read with other portions of Rule 26(d), the word "contradicting," as used in the rule, is synonomous with "impeaching."

The trial court therefore erred in its ruling. That the error was prejudicial becomes apparent when the situation is fully considered. Appellant could not, under the rules, cross-examine Salerno as an adverse party. Naturally appellant could not risk being bound by the testimony of this hostile witness, and his only insurance against such a result was his right to impeach the witness if he did not testify truthfully and in accord with his deposition.

The ruling foreclosed appellant from pursuing his inquiry into these very vital and important matters. If, as appellant contends, Salerno knew the recitals as to location and brand were not true when he put them into the contract, appellant had the right to

make him explain why he put them there. If there was any actual ambiguity in the contract of the nature held by the trial court, appellant had the right to make him explain whether or not any particular herd of steers was intended, or if that was not the case, whether or not the parties had agreed on any particular kind, size, grade, or type. If there was any such ambiguity, it was of Salerno's making, and it came about only because he put these recitals in the contract when he knew they were not the fact. Appellant had the right to his explanation, and to see that it was a truthful one. And if appellant had made him an offer to settle the controversy by getting steers on the market and delivering them, appellant had the right to make him tell the truth about that. Of the utmost importance, appellant had the right to make him tell just what took place during the negotiations between him and appellant after the contract was signed, just what was agreed upon, and whether or not the contract was merely modified or if it was completely abandoned and a new agreement reached. In short, appellant had the right to make him tell the facts, and all the facts, about the matters in issue in this case. The only insurance appellant had that he could be made to tell the truth was by using his pre-trial deposition to impeach him if he did not. When the trial court ruled that could not be done, appellant could no longer pursue such inquiries except at the risk of being bound by the untruthful testimony of a hostile witness.

The consequences are evident. The trial court said

it would not believe anything appellant testified to except where it was corroborated by other evidence. Necessarily, then, what the court did find is based only on inferences instead of direct evidence. The court's attitude in protecting this witness changed the whole course of the trial. The ruling was prejudicial error.

V

Did respondent suffer any damages, and if so, are the same recoverable under the evidence in the case?

Specifications of Error X and XI are both related in this question, and will be discussed together. Appellant challenges the correctness of Findings of Fact VIII, XII, XX and XXII.

Respondent sought to prove its alleged damages by showing the difference between the contract price and the market price at the place and time for delivery under the contract. This is the proper method under the Idaho law.

The only evidence on the market prices was given by respondent's witness, Garth Peck. It is not in dispute. According to this witness, the market price for slaughter steers ranged from 16 or 17 cents for lowest grades to 25 or 26 cents for good or better grades. (Record, pages 87-89). The contract price, converted from a dressed weight basis to live weight basis, was 17½ cents for steers grading A grade, price for other grades to vary according to difference between Buyer's market price for "A" grade and the grade of such steers grading other than "A"

grade.

The trial court found that the contract required good quality grade, worth 25 cents on the market, and assessed damages on the basis of the difference between 17½ cents and 25 cents, or 7½ cents per pound. It also found that the average weight of the steers required by the contract was 950 pounds.

We have already discussed the court's findings in these respects. If our position is correct that all that could have been required was slaughter steers, it follows that respondent has not proved that it suffered any actual damages, because under the only testimony in the case, slaughter steers could have been obtained at or below the contract price from the market, and there is no evidence of the difference between Buyer's market price for "A" grades and other grades.

We have already cited cases which are authority for the proposition that, where nothing is said in the contract as to grade or quality, all that can be required is that the quality be merchantable or salable. Respondent will no doubt argue that the 7½ cent difference between the contract price and the market price would hold true regardless of grade, but there is no evidence to sustain such contention. The burden of proof was of course upon respondent to prove its alleged damages. It offered no evidence of the difference between "A" grade steers and its market price for other grades, and accordingly there is nothing upon which any determination in respect thereto can be based. It follows that there is no basis

for any contention that the damages would be the same regardless of grade.

The matter of weight is of even more inportance in the determination of damages. We have also discussed the reasons why the trial court's finding of a specific weight cannot be sustained under the evidence in the case, particularly with respect to the figure found by the court. It is quite obvious that the matter of weight is an essential element upon which damages, if any, would have to be calculated.

We recognize the rule that where there is proof, within the permissible range of certainty, a plaintiff should not be denied recovery because of the difficulty in accurately measuring the damages. What we do say is, that in this case, the proof does not fall within the required permissible range of certainty.

The rule which allows recovery in spite of the difficulty of proving damages with certainty does not mean there need be no proof of the amount. Obviously, a plaintiff may not come into court and say no more than "the defendant stole some of my wheat", or "the defendant did not deliver some goods he agreed to deliver." It is required, that an injured plaintiff must produce the best evidence available, and if that is sufficient to afford a reasonable basis for computing his loss, he will be allowed a substantial recovery, notwithstanding the exact amount of damages is incapable of ascertainment.

Here we say the respondent has not procured the best evidence obtainable, nor, for that matter, any competent evidence at all. The Peterson steers were

never shown or even claimed to be connected with the contract, nor were the Wyoming steers that were sold at Idaho Falls, in spite of what the trial court said about them in its memorandum decision. Neither did respondent adduce any evidence as to what size, grade, or type of steers were contemplated, although such evidence would have been properly admissible if there was any actual ambiguity in the contract, and Salerno could have testified thereto.

We have shown that the 950 pound figure reached by the trial court came out of thin air, and that there is no mention of any such figure in the evidence, including the evidence relative to the Peterson and the Wyoming steers. And if we are correct in saying that there is no basis for the 950 pound figure, this leaves the case in the condition that there is no reasonable basis in the evidence upon which the court can estimate, within the ordinary requirements of certainty, the damages sustained, and the findings relative thereto are no more than mere guesswork, which the law cannot sanction.

We have already referred to and discussed the case of Mason v. Ruffin, 130 So. 843, which illustrates exactly what we are here saying.

In Shannon v. Shaffer Oil & Ref. Co., 51 Fed. (2d) 878, the action was for damages for alleged breach of contract arising by way of waste of gas from an oil well. Plaintiff failed to avail himself of defendant's records relative to the well, leaving the evidence as showing only that an undetermined quantity of gas did escape. It was held that, while plain-

tiff could not be denied recovery because of difficulty in ascertaining the exact amount, if it was proved that his rights had been invaded, there could be no recovery permitted unless there was sufficient evidence produced to afford a reasonable basis for estimating his loss, and that he had failed to produce such evidence, although it was available to him. That is exactly what we have in this case, plaintiff had available the means of showing, or at least trying to show, just what size and type of steers were contemplated by the contract, through Louis Salerno. It failed to produce his testimony, and it offered no other evidence from which this could be determined.

In Duelen v. Karon, 191 Minn. 330, 254 N. W. 433, the court said:

> "While it is true that difficulty in assessing damages is not ground for denying the plaintiff relief . . . . yet where there is no evidence upon which the jury reasonably could assess the damages, it is error to allow them to return a verdict based upon mere conjecture."

Damages which are wholly uncertain cannot be made certain by adoption of an arbitrary standard of loss. Dexter-Portland Cement Co. v. Acme Supply Co., (Va.) 133 S. E. 788.

There is a further matter to be considered in determining whether or not respondent is entitled to any damages. Appellant alleged that he had offered to obtain steers on the market and deliver them to respondent at the contract price to satisfy any obli-

gation he might owe to respondent. The trial court held no such offer was ever made. In his memorandum opinion, the court said, "Defendant did not offer to perform the contract, as he claims. In this and in all other phases I place no credence whatever in his testimony."

It is, of course, elementary that if appellant actually did offer to perform, and his offer was refused, there can be no recovery for non-performance.

The question of whether or not an offer to perform was made is entirely factual. Demand for delivery appears to have first been made by Salerno orally. (Record, page 130). In response to this demand, appellant did offer to do certain things. The record shows as follows, on page 158:

> Q. Now, what was said and done there, just go ahead with the conversation?
>
> A. He said according to that contract I have got to deliver three hundred head of steers branded with O on the left hip and I argued that the contract didn't say so and he said "Well, I am making demand for three hundred cattle" and I said "I will get the contract and we will read it." I said "what kind of cattle does that say" and he said "steers" and I said "I will go to Denver and buy you three hundred steers and sell them to you for 17½ cents", and he said, "What kind of steers", and I said "Steers as called for in the contract and will sell them for 17½."

This testimony stands uncontradicted.

In addition to the oral testimony, in his letter of August 22, 1947, Exhibit 11, appellant tried to get the

dispute settled by having respondent accept his other sattle at a slightly higher price, but stated in the letter that if this offer was not acceptable, "I will put in other cattle by First of Oct. and get rid of these."

The trial court, as stated, disregarded this testimony, and also ignored the offer in appellant's letter, Exhibit 11, although none of it was contradicted in any way. Again the rule applies that the trial court could not reject uncontradicted testimony, particularly where it is within the power of the other party to attempt to disprove it, if it were untrue. Certainly, if appellant's testimony that he made this offer was untrue, the man he made the offer to, Louis Salerno, was right there in the courtroom to deny it. He did not deny it.

In addition, for the trial court to utterly ignore the statements in Exhibit 11, was a purely arbitrary action and prejudicial error.

We think the evidence shows that appellant did offer to do everything be was obliged to do under the terms of the contract, and when his offer was rejected, respondent is barred from asserting any claim for damages for breach of the contract.

VI

Did the respondent fully perform the terms of the contract on its part to be performed?

This question is raised by Specification of Error XII, and appellant here challenges Findings of Fact VI, XIII and XVI.

The trial court found that respondent fully per-

formed all of the conditions of the contract on its part to be performed. It found that respondent paid the $3,000.00 down payment on account of the steers covered by the contract, and that there was no failure of consideration.

Most of the factual matters relating to these findings have been incidentally referred to in discussing other questions. The facts themselves are not in much dispute, only the interpretation thereof.

Looking at the contract document, the primary obligation on the part of respondent was the payment of the purchase price, as is the case in most executory contracts of sale.

The contract recites: "The Buyer herewith pays to the Seller, receipt of which by the Seller is hereby acknowledged, the sum of Three Thousand ($3,000.-00) Dollars, as partial payment upon the purchase price of said steers."

We have pointed out that no such payment was actually made at the time the contract was signed, and that no payment of any kind was made until five or six weeks later. We have also shown that when a payment was made, it was in the form of a draft which showed on its face that it was for a different number of steers than the number specified in the contract.

The issue is simple, but of much importance. Was the down payment recited in the contract actually made on that particular contract?

The mere recital of receipt of a payment in a simple contract does not prohibit proof that the con-

sideration was never in fact paid. Kay v. Spencer (Wyo.) 213 Pac. 571; Wurdeman v. Waller, (Cal.) 263 Pac. 558.

Such recitals amount to nothing more than a receipt, and as such are open to explanation by parol testimony. Jones v. Nelson, (Wash.) 167 Pac. 1130.

The uncontradicted evidence in this case shows that the only payment which was ever made by respondent was not made on this contract. Not only does the draft by which the payment was made indicate this, but we call particular attention to the direct testimony of appellant on pages 148-149 of the record, and his testimony in his pre-trial deposition on pages 94-95 of the record. This testimony was not contradicted. It was direct and positive that the $3,000.00 was not paid on this contract. The trial court had no right to reject it, and it must be taken as the fact.

Besides standing undisputed, this testimony is substantiated by other evidence in the case. The parties did engage in negotiations after the original contract was signed, and no payment of any kind was made until after these negotiations were ended.

Why did respondent delay in making the payment for these several weeks? The answer is obvious—no real agreement had been reached.

So far as the original contract was concerned, the payment was never made, and there was as a result a total failure of consideration. By reason thereof, the contract never went into effect. Kay v. Spencer,

supra.

The failure to make the payment at the time the contract was signed, and the delay in making any payment at all, are responsible for much of the difficulty the parties are now in. We have previously shown that because no money had been put up, appellant delayed closing his deal with Peterson Brothers, and thereby lost out in getting that particular herd. When the payment was finally made, respondent knew appellant had not yet procured steers for the contract. The payment was made on the understanding that appellant was to try to get steers during the winter. (Record, pages 103, 152-153). Appellant was not permitted to show why he did not thereafter procure steers. (Record, page 153). The trial court was adhering to its view that the original contract was the only contract, and because this was not the case, the ruling was not correct. It is quite obvious, however, that cattle were not thereafter procured because they were not available at that late date. The season run was over.

The contract indicated that the parties expected respondent to do certain other things in addition to the payment of the purchase price. The contract says that "Sellers operations in connection with his caring for, feeding, and for dehorning said cattle shall be subject to Buyer's inspection at any and all times, but Buyer assumes no responsibility in connection therewith." We do not maintain that this places any actual obligation on respondent to make any inspections, but it certainly indicates that re-

spondent could and would do so. It is a matter of common knowledge that cattlemen will drive many miles out of their way just to look at a herd of some other man's cattle, not to speak of their own. Here we have a comparatively small packing company, whose chief cattle buyer undoubtedly must have been within a few miles of the ranch where his company was supposed to have a large and valuable herd, on many occasions, where he was expected and had the right to make inspections, yet during the entire period of nine months after he was supposed to have purchased them, he never went near them, and never made any inquiry as to their condition. It certainly indicates very strongly that neither he nor his company regarded their supposed contract as of any particular force or effect. It also tended to corroborate what appellent said—that the original deal was called off and a substitute agreement made.

If, as we contend, the down payment was never made on the original contract, but was made on another or different deal, there was a complete failure of consideration so far as the original contract was concerned, and there was no contract. The trial court was in error in its findings in respect thereto.

VII

Did the trial court err in denying appellant's motion to dismiss at the close of respondent's case?

This question is raised by Specification of Error XIII.

In our argument on other issues of this case, we

have already discussed most of the facts which go to this question, and it will not be necessary to review them in detail.

In the motion addressed to the trial court at the close of respondent's case, appellant urged as one of the grounds of the motion that the evidence showed the original contract was conditionally delivered, and the conditions never met.

As the evidence stood at the close of plaintiff's case, it showed that appellant had demanded the elimination of the three per cent shrinkage provision. Whether or not this condition was ever met in the subsequent negotiations of the parties is of no great importance. What is important is that the evidence shows conclusively that because this demand had been made, it caused the parties to enter into negotiations after the original contract was signed, which resulted in at least one substantial change.

We think the evidence when respondent rested its case shows also the existence of the second condition precedent that it was understood the contract was not to be in effect unless and until appellant procured steers for it. Appellant had then testified that Salerno knew he did not have the steers at the time the contract was signed. (Record, page 35). The evidence also showed that no payment had been made on the original contract, and that the original contract had been more or less disregarded (Record, pages 94-97). The evidence further showed that Salerno knew no cattle had been purchased at least a

month after the contract was signed (Record, pages 102, 103). The evidence showed Salerno and respondent agreed to a different number than the original contract specified (Record, page 103). The evidence showed no down payment had been made at the time the original contract was signed (Record, page 103). All of these things put together show that there was no actual delivery of the original contract because it was subject to this condition.

It will no doubt be argued, that even if there were any conditions, they were waived when appellant accepted the down payment. This does not follow, because the evidence shows, and the court necessarily had to find, that the payment was on a modified or different deal. No down payment was ever made on the contract as it originally stood. The only reason it was not made was because these conditions did attach, and the evidence so showed when the motion was made.

The next major element which was called to the attention of the trial court was the lack of identity of the subject matter of the contract. It will no doubt be argued that when respondent states, as we have stated, that the contract, on its face appeared certain and unambiguous, appellent cannot, through parol or extrinsic evidence, inject uncertainty or ambiguity. However, it was not appellant but respondent who injected the ambiguity and uncertainty when it adduced evidence about the Peterson and Wyoming steers, as the record will show.

As we have said, the recitals in the contract on

their face, appear to completely identify the subject matter. Respondent itself, however, showed that there were no such steers as described in the contract (Record, page 21). Respondent then immediately commenced interrogating appellant about the Peterson steers. The only possible reason for evidence concerning other steers was because uncertainty or ambiguity arose when respondent showed there were no steers in existence as described in the contract.

Respondent not only injected the uncertainty as to the subject matter into the case, but it is responsible for there being any uncertainty in the first place. Respondent drew the contract, and it put these recitals in the contract from which the uncertainty arises, and it put them there knowing they were not true.

Under ordinary circumstances, after producing the contract and showing default in delivery, it would complete its case by showing what were the weight and grade of the steers described and identified in the contract, and showing the market value thereof.

Why, then, did respondent adduce evidence about steers other than those described in the contract? It was because, having shown the steers described in the contract did not exist, respondent had to give the court some basis to calculate the alleged damages. We think the evidence as to these other steers proves nothing so far as this contract is concerned. The man who could have told the court what kind, grade and weight of steers the parties agreed on, Salerno, was not called as a witness by his employer, although

he was present in court.

As the evidence stood when the motion was made, the subject matter of the contract completely lacked identity. It follows that there was no basis for the court to assess damages, except speculation and conjecture.

The final element called to the trial court's attention in the motion was that the evidence showed plaintiff had failed to perform the contract on its part. This, of course, refers to the making of the down payment. At the time the motion was made, the evidence showed that the payment was not made at the time the contract was signed, or on that contract at all, and the only payment ever made was on a different deal.

We respectfully submit, as the evidence stood when appellant moved for a dismissal, the motion should have been granted.

VIII

Appellant did not receive a fair trial.

A brief analysis of the memorandum decision shows that the trial court adopted an incorrect theory of the case, and appellant did not get a fair trial.

The Court says it is of the opinion that the written contract was a binding agreement, unconditionally delivered, or if its delivery was conditional that the condition was waived. We think this conclusion was reached because the court considered that only one condition attached—the elimination of the three per cent shrink provision. The court felt that any attempt to show that the contract was to be in force

only when the steers were obtained would be to vary the written instrument by parol evidence (Record, pages 141-142). As we have shown, this was an incorrect view and appellant was entitled to adduce evidence to that effect. The matter was properly pleaded.

As a result, only part of the material and pertinent facts which underlaid the whole course of dealing between appellant and respondent were brought to light, and the nature of this case is such that no fair decision could be reached without all the facts. There is enough in the record to show that what appellant sought to prove in this respect would have been well substantiated by what took place after the original contract was signed. This is demonstrated by considering how differently the whole situation would look if this evidence had been received.

The purposes underlying this deal are quite evident. Respondent wanted some young steers put on feed for about ten or twelve months under care of a good cattleman. It knew appellant and knew his ranch. He did not have any such steers and would have to buy them. They agreed to make a contract. The contract could have no meaning until the steers were obtained and it would naturally be so understood and agreed. When the contract was submitted to appellant it contained some things he did not like, so he demanded some changes. No down payment was made, and he naturally determined to wait until these matters were adjusted before buying the steers. Negotiations followed, and some-

thing different was decided on. Whether the result was a new agreement or a modification of the old one, it could have no meaning until the subject matter was obtained. And at that time of the season, whether or not steers could be obtained might be in doubt. When appellant tried to show these facts, he was foreclosed by another erroneous ruling of the court (Record, page 155). Appellant was thus foreclosed from showing, not only that the original contract was subject to this understanding that the steers would have to be obtained, but that the subsequent agreement was also on the same basis.

Respondent sought to conceal the fact that there were subsequent dealings after the original contract was signed, and that there was any modification or change. It offered no evidence with respect thereto. Appellant was permitted to show only a part. Nevertheless, with only part of the facts, the trial court undertook to make findings that the parties did subsequently modify or change the original contract, and to say what they agreed to. The result of such attitude is apparent and what could be expected. The Court has made the agreement, not the parties, and the agreement the Court made is far different from what the parties intended and agreed upon.

We think it was because the trial court erroneously refused to admit this evidence that he refused to give credence to appellant's testimony on other matters. The excluded matters were so closely tied in with what happened all the way through between Salerno and appellant that it was extremely diffi-

cult for appellant to give a clear account of other matters. It would only be through getting at all the facts that appellant's position would be made clear and convincing.

It was because the trial court felt the contract was complete and binding, and regarded by the parties as such, that the court disregarded the only direct testimony in the case and found the Wyoming steers were the steers referred to in the contract. It was error on error.

If we had the facts, and all of the facts before the trial court the trial court would not have had to resort to reading "between the lines," as the court admits it did (Record, page 167). Appellant should be granted a new trial, under such conditions that all the facts will come to light.